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State of New York Public Employment Relations Board Decisions from April 30, 1992

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from April 30, 1992

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Comments

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**ORANGE COUNTY CORRECTION OFFICERS
BENEVOLENT ASSOCIATION,**

Petitioner,

- and -

CASE NO. C-3846

**COUNTY OF ORANGE and SHERIFF OF ORANGE
COUNTY,**

Employer,

- and -

**ORANGE COUNTY DEPUTY SHERIFF'S
ASSOCIATION, INC.,**

Intervenor.

KAUFF, McCLAIN & McGUIRE (HARLAN J. SILVERSTEIN and BETH J.
FALK of counsel), for Petitioner

PROSKAUER, ROSE, GOETZ & MENDELSON (KATHLEEN M. McKENNA
of counsel), for Employer

WILSON & FRANZBLAU (KENNETH J. FRANZBLAU of counsel),
for Intervenor

BOARD DECISION AND ORDER

On May 21, 1991, the Orange County Correction Officers Benevolent Association (COBA) petitioned to represent certain Sheriff's Department personnel employed jointly by the County of Orange and the Sheriff of Orange County (County). COBA's petition was held in abeyance by the Director of Public Employment Practices and Representation (Director) pending the disposition of two improper practice charges filed against the County by the Orange

County Deputy Sheriff's Association, Inc. (DSA) because the improper practice charges could affect the processing of the petition. By decision dated January 31, 1992,^{1/} we rejected DSA's claim that the unit for which it was certified in 1981 included only deputy sheriffs. We found, rather, that the unit for which the DSA was certified included all of the departmental personnel covered by the joint employer relationship between the County and the Sheriff.^{2/} That is the unit COBA now seeks to represent by this petition. In our decision of January 31, we also held that the County had improperly recognized COBA in May 1990 as the bargaining agent for DSA's unit and we ordered COBA's recognition rescinded.

In its response to COBA's petition, DSA raised certain objections to the processing of the petition. The Director permitted DSA to file an offer of proof and a memorandum of law in support of its objections. DSA argued to the Director in those papers that COBA's petition should be dismissed because the County's recognition of COBA deprived it of its right to bargain on behalf of the unit for which it was certified. DSA also argued that COBA's petition was untimely because COBA was the recognized bargaining agent when it filed the petition. Finally, DSA alleged that the unit COBA seeks to represent is not the most appropriate. DSA

^{1/}25 PERB ¶3004 (1992).

^{2/}The unit's correction officers, for example, are no longer deputy sheriffs. The County eliminated that status for the correction officers and a number of other positions within the Sheriff's Department by a civil service reclassification which was effective in February 1990.

alleges that there should be two units, one consisting of all deputy sheriffs and the other consisting of all other Sheriff's Department personnel.

The Director's decision on DSA's objections was transmitted to the parties by letter dated March 2, 1992, in which he denied DSA's objections and ordered an election in the existing unit. DSA has filed exceptions to the Director's determination. DSA argues that the Director erred by processing COBA's petition, that he failed to address certain of its objections, and that the unit for which an election was ordered is not the most appropriate. In their response to DSA's exceptions, both the County and COBA argue that the Director's decision is correct and that DSA's objections are meritless.

We affirm the Director's determination and dismiss DSA's exceptions.

DSA's major contention is that COBA's petition should be dismissed because DSA should be given a reasonable period of time to negotiate a contract with the County, an opportunity it claims it lost in May 1990 when the County improperly recognized COBA. DSA's argument, however, ignores two salient facts which make its request for this type of equitable relief inappropriate. First, at the date the County recognized COBA, DSA was open to challenge by other unions under our Rules of Procedure (Rules). Therefore, the County's recognition of COBA did not deprive it of any part of an insulated period, unlike the circumstance in Village of

Sloatsburg,^{3/} the case DSA relies upon in support of its position. Second, DSA itself refused to bargain with the County for certain of the titles in its certified unit. The record of the improper practice proceedings makes it clear that DSA simply was not interested in bargaining across the full range of its certified unit. Even if the County had not recognized COBA in May 1990, we are not persuaded that DSA would have availed itself of an opportunity to bargain a contract covering the existing unit. The County's improper recognition of COBA, therefore, affords us no reason to dismiss COBA's petition and it must be processed if it has been otherwise properly filed pursuant to our Rules.

In that latter respect, DSA alleges that the petition must be dismissed as untimely because COBA was the incumbent union at the date its petition was filed. Although the Director did not specifically consider this objection, our decision on DSA's improper practice charges is necessarily dispositive. By our decision of January 31, 1992, we ordered COBA's recognition rescinded. Having had its recognition nullified, COBA's petition is correctly processed under §201.3(e) of our Rules, which permits petitions by unions, other than the incumbent, to be filed during the period from 120 days after expiration of a contract^{4/} between an employer and an incumbent union until a new contract is executed. When COBA's petition was filed, DSA's improper practice charge alleging that

^{3/}20 PERB ¶4003, aff'd on other grounds, 20 PERB ¶3014 (1987).

^{4/}DSA's last contract with the County expired on December 31, 1989.

COBA had been improperly recognized was already pending. The County's improper recognition of COBA gave COBA no rights of incumbency at any time. COBA's petition would have been properly dismissed had we upheld the County's recognition because it would have been untimely filed by the incumbent bargaining representative.^{5/} Having voided COBA's recognition, however, COBA's petition is timely filed by a union challenging DSA as the majority representative for the existing unit.

DSA last objects to the Director's order of an election, alleging that the unit is inappropriate. We hold, however, that DSA cannot raise a unit question in response to COBA's petition which raises only an issue of majority support within the existing unit. In Town of Brookhaven,^{6/} we held that an employer could not challenge the appropriateness of a unit outside of the one-month window period provided in §201.3(d) of our Rules^{7/} in response to a union's petition seeking to replace the incumbent union as the representative for an existing unit. The Director refused to consider the unit question as raised by the employer and ordered an election in the existing unit. We affirmed the Director's decision in that case and, as the material circumstances are no different here, we similarly affirm his decision in this case. We again

^{5/}Village of Sloatsburg, 20 PERB ¶3014 (1987).

^{6/}19 PERB ¶3010 (1986).

^{7/}DSA, as the incumbent union, was similarly restricted to that one-month period for filing challenges to the composition of its unit.

express no opinion, however, about the appropriateness of the existing unit. It is not an issue properly before us at this time.

For the reasons set forth above, IT IS, THEREFORE, ORDERED that DSA's exceptions are denied, the Director's decision is affirmed, and the case is remanded for an election as ordered by the Director.

DATED: April 30, 1992
New York, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHENECTADY POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-11559

CITY OF SCHENECTADY,

Respondent.

**GRASSO AND GRASSO (JANE K. FININ and KATHLEEN R. DeCATALDO
of counsel), for Charging Party**

**ROEMER & FEATHERSTONHAUGH, P.C. (JAMES W. ROEMER, JR. and
ELAYNE G. GOLD of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Schenectady (City) and the Schenectady Police Benevolent Association (PBA) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the PBA against the City.

The PBA alleges in its charge that the City violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally established several new rules and procedures in February and March of 1990 pertaining to the implementation of General Municipal Law (GML) §207-c. GML §207-c obligates the City to pay a police officer who is injured or becomes ill in the line of duty the full amount of his or her salary or wages, medical and hospital expenses.

After a hearing, the ALJ dismissed the subparagraph (a) and (c) allegations for lack of proof.^{1/} The ALJ also dismissed those parts of the PBA's subparagraph (d) allegation which concern the City's requirement that an injured police officer assume a light duty position and that an employee submit to surgery as ordered by the City as a condition to the receipt of GML §207-c benefits. The PBA argues in its exceptions that the ALJ erred on the law in dismissing the first because the light duty requirement is, contrary to the ALJ's conclusion, mandatorily negotiable, and erred on the facts in dismissing the second because the City's new surgical requirement, which the ALJ held was mandatorily negotiable, changed a prior practice. The ALJ otherwise sustained the PBA's charge, holding that the City violated §209-a.1(d) of the Act when it:

1. required injured officers to submit to a physical examination on the officers' own time after returning to work;
2. required reinjured officers to report the date of original injury to the desk officer with a verifying medical report;
3. required officers to obtain an authorization from the City's physician for any surgical procedure recommended by the officers' personal physician; and
4. required officers to execute a medical confidentiality waiver form to the City's examining physician when the

^{1/}No exceptions have been taken to this aspect of the ALJ's decision.

officers appeared for examination of a GML §207-c injury.

The ALJ held that these four requirements were mandatorily negotiable and that the City unilaterally changed its practice by their imposition.

The City argues in its exceptions that the four rules or procedures enumerated above are not mandatorily negotiable. In this respect, the City argues that GML §207-c preempts any duty to bargain, that the ALJ failed to identify and properly balance its interests in promulgating these rules and incorrectly disregarded the City's practice under the Workers' Compensation Law in deciding that the promulgation of the GML §207-c procedures changed its practice. The City, however, has not filed any exceptions to the ALJ's findings of fact.

This is the third recent case we have had involving the City's promulgation and enforcement of rules designed to implement the provisions of the GML. In addressing GML §207-c procedures in one case,^{2/} we had an opportunity to consider indirectly the City's argument here that GML §207-c preempts any duty to bargain over the procedures by which the statutorily mandated payments of wages and health care expenses are made. We there observed that bargaining which is otherwise required by the Act is preempted by a different statute only when the different

^{2/}City of Schenectady, 19 PERB ¶13051 (1986), conf'd, City of Schenectady v. PERB, 135 Misc.2d 1088, 19 PERB ¶17023 (Alb. Co. Sup. Ct. 1986), aff'd, 132 A.D.2d 242, 20 PERB ¶17022 (3d Dep't 1987), motion for leave to appeal denied, 71 N.Y.2d 803, 21 PERB ¶17007 (1988).

statute dictates "conduct to such an extent that a public employer cannot impose variations of such conduct."^{3/} Because the ALJ's negotiability determination was not raised to us on appeal in that case, we had no occasion to consider a preemption argument any further, nor did we there reach the merits of the ALJ's negotiability determination.

In a second case^{4/} involving similar statutory wages and benefits paid to fire fighters pursuant to GML §207-a, we held that the City's promulgation and implementation of certain new procedures designed to implement GML §207-a were terms and conditions of employment which had to be bargained prior to implementation.

The subject matter of GML §207-c is an employee's wages, salary and other economic benefits. All of the procedures promulgated by the City, including the light duty and surgical requirements, condition, restrict, and potentially deny the employee's receipt of these wages and economic benefits. The §207-c benefits are all a form of wages, and wages are by definition in §201.4 of the Act "terms and conditions of employment". To whatever extent some balance may be required or warranted, we are unable to identify in the conditions for the payment of an employee's wages and economic benefits any mission-related managerial interests which would favor a finding that any of these procedures are not terms and conditions of employment.

^{3/}19 PERB ¶3051, at 3108 (1986).

^{4/}City of Schenectady, 24 PERB ¶3016 (1991).

As to the City's argument that the ALJ improperly disregarded the City's practice under the Workers' Compensation Law, we agree with the ALJ that the City's practice under that statute is not material to its practices under the GML. The two statutes are distinct and impose their own set of rights, duties and privileges.

We turn lastly to the City's argument that GML §207-c preempts the bargaining which is otherwise required by our conclusion that the procedures in issue are terms and conditions of employment. As we view it, the City's general preemption argument embraces three distinct legal theories.

First, we reject any notion that GML §207-c procedures in issue are prohibited subjects of bargaining. As the Court of Appeals^{5/} has now made manifestly clear, bargaining over terms and conditions of employment is not prohibited unless a statute clearly prohibits bargaining or the bargaining would necessitate the employer's surrender of some nondelegable duty or responsibility whether arising under statute, constitution or public policy. GML §207-c does not by its terms prohibit such bargaining in any relevant respect nor does it mandate any of the procedures the City adopted. Therefore, negotiations about these GML §207-c procedures are not prohibited.

Second, we also reject the City's preemption claim to whatever extent it is intended to encompass an argument that

^{5/}Board of Educ. of the City School Dist. of the City of New York v. PERB, 75 N.Y.2d 660, 23 PERB ¶7012 (1990).

the procedures it adopted did not have to be bargained because they were the undertakings minimally necessary to implement GML §207-c. The City has processed GML §207-c claims for years under procedures different from those it adopted in February and March 1990, thereby establishing that the new procedures were not minimally necessary to the implementation of GML §207-c. The City may have found those earlier procedures to be inadequate to its current purposes, but that does not permit the City to avoid its obligation under the Act regarding the imposition of the new GML §207-c requirements.

The City's third preemption theory raises an issue of legislative intent. The Legislature may, of course, exempt terms and conditions of employment from the scope of compulsory negotiations by sufficiently plain and clear evidence of that intent.^{6/} Having reviewed GML §207-c and the cases arising thereunder, we find sufficient evidence of that intent regarding the City's imposition of a light duty assignment and its imposition of the requirement that employees submit to surgery as ordered by the City or forfeit GML §207-c benefits. In both of these respects, but not otherwise, GML §207-c by its terms defines both the employer's and employee's rights and obligations and it further specifies the consequences to the employee for noncompliance. Superimposed upon this statutory scheme in these

^{6/}See, e.g., Webster Cent. School Dist. v. PERB, 75 N.Y.2d 619, 23 PERB ¶7013 (1990); Elmira City School Dist. v. PERB, 74 N.Y.2d 395, 22 PERB ¶7032 (1989).

respects is a judicially created system of due process hearing protections.^{7/}

In GML §207-c, insofar as it applies to an employer's right to make light duty assignments and its right to treat injured employees with surgery as may be appropriate, is the same type of legislative scheme as the one the Court of Appeals in Webster Central School District v. PERB (Webster)^{8/} found to be sufficient to exempt an employer from a duty to bargain a decision which would otherwise have been mandatorily negotiable under the Act. It is true that, unlike in Webster, the GML predates the Act. However, the language of GML §207-c^{9/} and its system of administration in these two respects is incompatible with a decisional bargaining obligation. It is that incompatibility, not the dates of enactment of the two statutes,

^{7/}See, e.g., Hodella v. Town of Greenburgh, 73 A.D.2d 967 (2d Dep't 1980), motion for leave to appeal denied, 48 N.Y.2d 708 (1980).

^{8/}Supra note 6.

^{9/}Section 207-c.1 provides in relevant part that "the municipal health authorities or any physician appointed . . . by the municipality . . . may attend any such injured or sick policeman, from time to time, for the purpose of providing medical, surgical or other treatment, or for making inspections Any injured or sick policeman who shall refuse to accept medical treatment or hospital care or shall refuse to permit medical inspections . . . shall be deemed to have waived his rights . . . in respect to expenses for medical treatment or hospital care rendered and for salary or wages payable after such refusal."

Section 207-c.3 provides in relevant part that ". . . payment of the full amount of regular salary or wages . . . shall be discontinued with respect to such policeman if he shall refuse to perform such light police duty if the same is available and offered to him provided, however, that such light duty shall be consistent with his status as a policeman and shall enable him to continue to be entitled to his regular salary or wages"

which dictates the result we reach. Whether a particular light duty assignment^{10/} or ordered surgery is consistent with the employee's rights under GML §207-c or under the parties' contract are issues unrelated to this negotiability determination. We consider such issues to be appropriate for judicial review or arbitration. We express no opinion as to whether and to what extent the procedural implementation of these two requirements might be mandatorily negotiable because those questions are not raised in this case.

Our negotiability determination makes it unnecessary to reach the PBA's remaining exception that the City's surgical requirement changed its prior practice. Even if there were such a change, the City's unilateral action in conditioning payment of GML §207-c benefits upon an employee's willingness to undergo surgery as ordered by the City would not violate the Act because the City is not under any duty to bargain that particular decision.

For the reasons set forth above, we deny the parties' exceptions and affirm the ALJ's decision to the extent it is consistent with our decision herein.

IT IS, THEREFORE, ORDERED that the City of Schenectady:

1. Immediately rescind and cease implementation of its GML §207-c procedures which require a previously disabled officer to submit to a physical examination on the

^{10/}For example, the PBA argues in its exceptions that the ALJ mischaracterized the City's right to require light duty under GML §207-c. The PBA alleges that a light duty assignment may be made under GML §207-c only if an officer has first been found to be ineligible for or is not granted a disability retirement.

officer's own time after returning to work; require an officer suffering a recurrence of a duty-related injury to submit the original date of injury and verifying medical reports; require an officer to obtain prior authorization from the City's physician for surgical treatment recommended by the officer's personal physician; or require an officer to execute a medical confidentiality waiver form to the City's examining physician.

2. Make unit employees whole for any wages, salary, or other benefits lost as a result of the implementation of any of the aforementioned procedures with interest at the currently prevailing maximum legal rate;
3. Sign and post notice in the form attached in all locations at which informational notices to unit employees are ordinarily posted by the City.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the
Schenectady Police Benevolent Association that the City of
Schenectady will:

1. Immediately rescind and cease implementation of its General Municipal Law §207-c procedures which require a previously disabled officer to submit to a physical examination on the officer's own time after returning to work; require an officer suffering a recurrence of a duty-related injury to submit the original date of injury and verifying medical reports; require an officer to obtain prior authorization from the City's physician for surgical treatment recommended by the officer's personal physician; or require an officer to execute a medical confidentiality waiver form to the City's examining physician; and
2. Make unit employees whole for any wages, salary or other benefits lost as a result of the implementation of any of the aforementioned procedures with interest at the currently prevailing maximum legal rate.

CITY OF SCHENECTADY

Dated.....

By.....
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, MASSENA
MEMORIAL HOSPITAL UNIT 8415,

Charging Party,

-and-

CASE NO. U-11846

MASSENA MEMORIAL HOSPITAL,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (MAUREEN SEIDEL of
counsel), for Charging Party

WYSSLING, SCHWAN & MONTGOMERY, ESQS. (RICHARD H. WYSSLING
of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Massena Memorial Hospital (Hospital) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Massena Memorial Hospital Unit 8415 (CSEA), which has itself filed cross-exceptions to the ALJ's decision.

CSEA alleges that the Hospital violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally promulgated and implemented a smoking ban throughout the Hospital in July 1990.

The ALJ found on a record developed without a hearing that until July 1990, employees smoked in the cafeteria, five lounges, the CSR kitchen area, the dish rooms, the medical transcription room, the purchasing room, the nursing conference rooms, the main lobby, and the old chapel. The ALJ held that the smoking ban was mandatorily negotiable as to all of these areas except the main lobby and the old chapel. Citing our decision in County of Niagara,^{1/} the ALJ found no violation insofar as the ban applied to these latter two areas because they were open to the Hospital's patients. The ALJ found, however, that the other areas mentioned, except for the cafeteria, were not open to either the public or patients. Finding no evidence in the stipulated record showing that employees objected to smoking in these areas, even in those which might be considered work areas under the Clean Indoor Air Act (Air Act),^{2/} the ALJ concluded that the ban both exceeded the requirements of the Air Act and any of the Hospital's managerial interests. As to the cafeteria, which continued to be open to visitors as well as to employees, the ALJ found that it was not open to patients and that access by the public did not render the Hospital's total ban on smoking in the cafeteria a nonmandatory subject of negotiation.

^{1/}21 PERB ¶3014 (1988).

^{2/}N.Y. Pub. Health Law, Art. 13-E (McKinney 1990).

The Hospital excepts to certain of the ALJ's findings of fact and to her legal conclusion that the smoking ban was mandatorily negotiable in any respect. Regarding the latter point, the Hospital argues that the ALJ incorrectly applied the balancing test for determining negotiability of smoking policies. CSEA argues that the Air Act has superseded any balancing test and has made all workplace smoking rules, except those required by the Air Act, mandatorily negotiable per se, but it otherwise supports the ALJ's decision.

The Hospital first argues that the ALJ erred by identifying "male" and "female" lounges in addition to the janitors' and housekeeping lounges. The Hospital alleges that the male and female lounges referenced by the ALJ are not separate lounges, but merely different names for the janitors' and housekeeping lounges, respectively, where employees admittedly smoked before the ban. Assuming the accuracy of the Hospital's representation in this respect, the ALJ's error is nonprejudicial to the Hospital because the reference to the male and female lounges becomes a mere misnomer, which affects neither the finding of a violation nor the remedy. On that basis, we deny this part of the Hospital's exceptions.

The Hospital also argues that the record does not establish that employees smoked in the radiology lounge before the ban. However, in a letter filed by the Hospital with the ALJ dated January 25, 1991, the Hospital agreed with CSEA's representation

that employees had smoked in the radiology lounge from March 1987 to July 1990. This part of the Hospital's first exception is, therefore, also denied.

The Hospital similarly argues that there is no evidence that employees smoked in the CSR kitchen area, the dish rooms, the medical transcription room or the purchasing room. However, the record again shows that the ALJ's findings in these respects are correct. The parties' joint stipulation of fact shows that the CSR kitchen area was a designated smoking area under the Hospital's 1989 smoking policy. For the other three areas, the Hospital, in its January 25, 1991 letter to the ALJ, again specifically admitted that employees smoked in those areas from 1987 to 1990.

With respect to these same four areas, the Hospital also argues that the ALJ erred by implying that employees consented to smoking from an absence of evidence of any objection to smoking in those areas. Individual employee consent is made relevant to the negotiability of the Hospital's smoking policy by the Air Act, which makes employee consent a factor in work areas, conference rooms and meeting rooms, as defined in that statute. As the ALJ correctly noted, the record does not establish either that any of the four areas mentioned in this respect are work areas, conference rooms or meeting rooms or that any employees ever objected to smoking in those areas. We consider evidence in these respects to have been part of the Hospital's defense to

CSEA's unilateral change allegation because it is seeking to defend the adoption of a smoking ban which, but for the Air Act, would violate CSEA's bargaining rights under the Act.^{3/} There being no claim that the Hospital offered to the ALJ any evidence at all regarding the nature of the rooms or the employees' objection to smoking therein, it bears the responsibility for the omission.

The Hospital next argues that the ALJ erred by finding that the cafeteria is not open to patients. The Hospital alleges that the cafeteria is open to its patients and that it is frequented by them.

From the ALJ's conclusion that the ban on smoking in the main lobby and the old chapel is a management prerogative because patients use those areas, it is clear that the ALJ would have upheld the smoking ban as it applied to the cafeteria if she had found that the Hospital's cafeteria is open to its patients. That result would have been a correct application of County of Niagara, in which we held that "a health facility . . . may, in furtherance of its mission, ban smoking by its employees in those areas . . . which are customarily used by its patients."^{4/}

^{3/}See, e.g., Oneonta City School Dist., 24 PERB ¶3025 (1991).

^{4/}21 PERB ¶3014, at 3030 (1988).

We have carefully reviewed the record in this case and we find that the ALJ's conclusion that the cafeteria is closed to its patients is not supported by the record. The Hospital's 1987 and 1989 smoking policies do not show that the cafeteria has been closed to the Hospital's patients. We believe, moreover, that it is reasonable to presume that areas within a hospital which are open to all members of the public are also open to any patients who are medically authorized to move about the hospital. There being no evidence to rebut that presumption, we reverse the ALJ's finding^{5/} that the cafeteria was not open to the Hospital's patients. Our finding that the cafeteria was open to any patients at all relevant times and the ALJ's determination on the negotiability of the ban as applied to the old chapel and main lobby triggers consideration of CSEA's cross-exception.

CSEA argues that the Air Act supersedes our balancing test^{6/} such that we are prohibited from upholding any aspect of a smoking ban under a balancing test. We disagree with this proposition. Those aspects of a smoking ban which are more

^{5/}The presumption substitutes for the absence of proof in this respect and satisfies the Hospital's burden of proof on this issue.

^{6/}We determine the negotiability of many subjects by a balancing test, which weighs the interests of both the employer and the employees. A somewhat oversimplified summary of the balancing test is that a subject is mandatorily negotiable if it is primarily related to or affects the employees' terms and conditions of employment and nonmandatory if it is primarily related to or affects the employer's mission or services to the public.

to "the applicable law governing collective bargaining."^{1/} The applicable law governing collective bargaining includes the use of a balancing test to determine the negotiability of many subject matters. We have resorted to a balancing test in assessing the negotiability of an employer's smoking policies and nothing in the Air Act requires us to abandon that approach. Therefore, we affirm the ALJ's application of a balancing test to determine the negotiability of the Hospital's smoking ban.

The Hospital's last exception relates to the application of that balancing test. The Hospital first argues that the ALJ misapplied that balancing test because a smoking ban in any acute care facility should be considered per se mission-related and, therefore, always a nonmandatory subject of negotiation. Acceptance of the Hospital's arguments in this respect would necessitate a reversal of County of Niagara. As we continue to believe that County of Niagara was correctly decided, and that it reflects a proper balance of the rights and interests of employers, employees and the public, we deny the Hospital's exceptions insofar as it urges us to hold that a smoking ban in all hospitals is a nonmandatory subject of negotiation as a matter of law.

The Hospital also argues that it was denied an opportunity to present evidence pertaining to the impact of secondary smoking, ventilation and other of the Hospital's architectural

^{1/}N.Y. Pub. Health Law, §1399-o.6(i) (McKinney 1990).

limitations which it believes would have influenced the ALJ's negotiability determination in its favor. However, other than generally requesting a hearing, the Hospital neither informed the ALJ that it had evidence material to a negotiability balance nor advised her as to the nature of the information it wanted to introduce during the several months in which the record was being developed. It was not until the Hospital filed its brief with the ALJ that it first told her what it wanted to introduce regarding the negotiability of its smoking ban. Thus, we do not consider the ALJ to have refused the Hospital's request for the introduction into the record of relevant evidence. Rather, we consider the Hospital to have failed to make a timely request for the introduction of that evidence. Therefore, this last aspect of the Hospital's exceptions is also dismissed.

For the reasons set forth above, CSEA's cross-exceptions and the Hospital's exceptions, except insofar as the Hospital's exceptions pertain to the negotiability of the cafeteria smoking ban, are denied, and the ALJ's decision is affirmed, except as noted above.

IT IS, THEREFORE, ORDERED that the Hospital immediately rescind and cease enforcement of its smoking ban, which was effective July 15, 1990, as to employees in CSEA's unit, except insofar as the smoking ban applies to the Hospital's main lobby, old chapel and cafeteria, and that it post the attached notice in

all locations at which notices of information to CSEA unit employees are ordinarily posted.


DATED: April 30, 1992
New York, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees of Massena Memorial Hospital in the unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Massena Memorial Hospital Unit 8415 (CSEA), that Massena Memorial Hospital will rescind immediately its smoking ban, as applicable to CSEA unit employees, except as to the main lobby, old chapel, and cafeteria.

.....MASSENA MEMORIAL HOSPITAL.....

Dated.....

By.....
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-11849

STATE OF NEW YORK (DEPARTMENT OF LAW),

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (MAUREEN SEIDEL of
counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (LAUREN DE SOLE of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Department of Law) (State) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). After a hearing, the Assistant Director held, on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it prohibited smoking in the Concourse Annex of the Department of Law effective June 11, 1990. In finding a violation, the Assistant Director rejected the State's contention that its smoking ban was mandated by the State's Clean

Indoor Air Act (Air Act)^{1/} because the nonsmoking employees who work in the Concourse Annex had complained to it that tobacco smoke from designated smoking areas within the Annex was entering their smoke-free work areas.

The State argues in its exceptions that we have no jurisdiction to interpret the Air Act and that the Assistant Director erred in his interpretation of that statute. CSEA argues in response that the Assistant Director's decision is correct and should be affirmed.

As to the State's first exception, its defense to the unilateral imposition of the smoking ban rests exclusively upon its asserted obligations under the Air Act. CSEA's charge complaining of a unilateral change in a mandatory subject of negotiation is plainly within our jurisdiction. Therefore, the interpretation of the Air Act is merely incidental to the exercise of our improper practice jurisdiction. We cannot accept the State's argument in this respect because it would mean that we could never exercise jurisdiction under the Act to reach the merits of any improper practice charge if the interpretation of a different statute were required. Whether the courts would defer to our interpretation of the Air Act is immaterial to our right and duty to consider that statute alongside our Act in order to make a proper disposition of CSEA's charge. For these reasons, we deny the State's first exception.

^{1/}N.Y. Pub. Health Law, Art. 13-E (McKinney 1990).

In its remaining exceptions, the State argues that the Assistant Director misconstrued controlling provisions of the Air Act. As it argued to the Assistant Director, the State again argues to us that its smoking ban was necessary to comply with the minimum requirements of the Air Act and, therefore, it had no right or duty to bargain with CSEA regarding the imposition of the smoking ban. For the following reasons, however, we find that the Assistant Director correctly interpreted the State's obligations under the Air Act and we affirm his decision.

The Concourse Annex is a place of employment as defined under the Air Act.^{2/} Within the Annex, there are several work areas, defined in the Air Act as places "where one or more employees are routinely assigned and perform services for their employer."^{3/} An employer is required under §1399-o.6(a) of the Air Act to provide its nonsmoking employees "with a smoke-free work area." A smoke-free work area is itself defined in the Air Act as "an enclosed indoor area in a place of employment where no smoking occurs."^{4/} Smoking is defined for purposes of the Air Act as "the burning of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco."^{5/}

^{2/}N.Y. Pub. Health Law, §1399-n.7 (McKinney 1990).

^{3/}N.Y. Pub. Health Law, §1399-n.14 (McKinney 1990).

^{4/}N.Y. Pub. Health Law, §1399-n.9 (McKinney 1990).

^{5/}N.Y. Pub. Health Law, §1399-n.10 (McKinney 1990).

The State argues that its obligation to provide its nonsmoking employees with a smoke-free work area includes a right and obligation to ban smoking in previously designated smoking areas whenever it has received complaints from nonsmoking employees that tobacco smoke is present in the air within their smoke-free work areas.

The State's interpretation of its obligation, however, appears to us to be wrong simply because it misconstrues the definition of a smoke-free work area. A smoke-free work area under the Air Act is a place in which no burning of tobacco products (i.e., smoking) is permitted. It is not an area totally free of tobacco smoke, regardless of its origin. Given this statutory definition, the State satisfied the mandate of the Air Act respecting a smoke-free work area by giving employees a work area in which no person is permitted to smoke by burning a tobacco product.

The State, however, buttresses its argument that it was required to ban smoking under the circumstances of this case by reference to §1399-o.6(b) of the Air Act which permits an employer to set aside a work area for smoking if all of the employees assigned to that work area agree to its designation as a smoking area. Reliance on that section of the Air Act, however, is not persuasive. Section 1399-o.6(b) of the Air Act, in context with §1399-o.6(a), which immediately precedes it, merely means that after having set aside smoke-free work areas

within a place of employment for all nonsmoking employees who want one, the employer may permit smoking within other areas if all of the employees assigned to those smoking areas agree to permit smoking. Section 1399-o.6(b) of the Air Act does not mean that smoking employees can be denied the smoking privileges the Air Act affords them within their work areas, or other places in which smoking is not prohibited by the terms of the Air Act, on the complaint of the nonsmoking employees who have otherwise been given a smoke-free work area as defined and limited in §1399-n.9.

If our conclusion that the State's smoking ban is more restrictive than the requirements of the Air Act and, therefore, mandatorily negotiable to that extent,^{6/} is not compelled by the controlling definition of "smoke-free work area", it finds further support both in the Air Act's definition of a "smoking area" and the Legislature's declared intent in enacting that statute.

Regarding the former, the definition of a smoking area^{7/} states that it shall "be separated from a smoke-free work area^{8/} by walls or some other means, equally effective in reducing the effects of smoke on the smoke-free work area, other than

^{6/}N.Y. Pub. Health Law, §1399-o.6(i) expressly subjects an employer's smoking policies which are more restrictive than the minimum requirements of that statute to the "applicable law governing collective bargaining."

^{7/}N.Y. Pub. Health Law, §1399-n.11 (McKinney 1990).

^{8/}The definition of a smoke-free work area in §1399-n.9 also provides that it shall be separate from any smoking area.

ventilation systems or air cleaning devices." (emphasis added) This provision of the Air Act plainly contemplates that smoking areas may be established and maintained along with designated smoke-free work areas. There is no suggestion in the language used in the definition of a smoking area that a smoking ban must be established on the complaint of a nonsmoker. We read this provision of the Air Act to require only that an employer separate smoking areas from smoke-free work areas by walls, or means other than walls, which can be no less effective than a wall system in reducing the infiltration of tobacco smoke into the smoke-free work areas. Having erected walls to separate work areas, the State has taken the steps required by the Air Act which the Legislature designed to reduce the nonsmokers' exposure to tobacco smoke. It was not required to go further and ban smoking throughout the Annex.

Our interpretation of the Air Act is also consistent with the Legislature's stated findings.^{2/} Although noting the hazards of second-hand smoke, the Legislature expressly stated that a "balance" had to be struck which recognized both the rights of the nonsmokers, whom the Legislature wanted to protect, and the "need to minimize governmental intrusion into the affairs of its citizens." Therefore, the Legislature declared that its purposes could be served by "limiting exposure to tobacco smoke." The Legislature's stated findings are carried out throughout the

^{2/}1989 N.Y. Laws, c.244, §1.

text of the Air Act itself. The Legislature clearly banned smoking in a number of areas within a place of employment.^{10/} Where smoking was not banned, however, the provisions of the Air Act reflect the Legislature's compromise between the rights of smokers and nonsmokers. To permit the State to ban smoking everywhere in the Annex because nonsmokers complained that tobacco smoke from designated smoking areas had infiltrated the air in their smoke-free work areas would disturb the legislatively created balance between the rights of smokers and the rights of nonsmokers.

As the Air Act does not provide for mandating a total smoking ban throughout the Concourse Annex, the State's unilateral imposition of such a ban, which rescinded the smoking privileges previously extended to unit employees within that facility, violated §209-a.1(d) of the Act. The Assistant Director's decision is, therefore, affirmed and the State's exceptions are denied.


IT IS, THEREFORE, ORDERED that the State rescind its June 4, 1990 memorandum which prohibited smoking in the Concourse Annex effective June 11, 1990, restore the smoking policy for the Concourse Annex as it existed prior to that date to the extent that such policy is in accord with the provisions of the Air Act, and sign and post the attached notice at all locations normally

^{10/}The Air Act expressly prohibits smoking in certain areas within a place of employment. N.Y. Pub. Health Law, §1399-o.6(c), (d) & (e) (McKinney 1990).

used to communicate with CSEA unit employees in the Department of Law at Albany worksites.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, who work in the Department of Law at Albany worksites, that the State of New York:

1. Will rescind its June 4, 1990 memorandum which prohibited smoking in the Concourse Annex effective June 11, 1990;
2. Will restore the smoking policy for the Concourse Annex as it existed prior to that date to the extent such policy is in accord with the provisions of the Clean Indoor Air Act, Article 13-E of the Public Health Law.

STATE OF NEW YORK (DEPARTMENT OF LAW)

Dated.....

By.....
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HEMPSTEAD CLASSROOM TEACHERS ASSOCIATION,

Charging Party,

-and-

CASE NO. U-11934

HEMPSTEAD PUBLIC SCHOOL DISTRICT,

Respondent.

KAPLOWITZ & GALINSON (DANIEL GALINSON of counsel),
for Charging Party

COOPER, SAPIR & COHEN (ROBERT E. SAPIR of counsel),
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Hempstead Classroom Teachers Association (Association) to a decision by an Administrative Law Judge (ALJ). The ALJ dismissed the Association's charge against the Hempstead Public School District (District) which alleges that the District violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it ceased payment of a \$250 longevity stipend after expiration of the parties' last contract. The ALJ held that the District's obligation to make the \$250 longevity payment ended with the expiration of the contract by the clear terms of the contract itself. Invoking the parol evidence rule, the ALJ rejected proof offered by the Association to establish that the parties did not intend the \$250 longevity payment to expire with the contract on

June 30, 1990.^{1/} Accordingly, the ALJ denied the Association's request for a hearing and held that the District did not violate the Act either when it did not pay the \$250 to persons who first allegedly became eligible for it after June 30, 1990, or when it reduced by \$250 the compensation of those unit employees who had been paid the \$250 longevity during the stated duration of the parties' contract.

In its exceptions, the Association argues that it should have been afforded a hearing, and that, in any event, the ALJ erred by finding that the District was permitted to discontinue the \$250 longevity payment for those employees who had already qualified and been paid that longevity before June 30, 1990, when the contract expired. The District argues in response that the ALJ's decision was correct in all material respects and should be affirmed.

The contract clause in issue provides:

Teachers who have completed 20 years of teaching, including salary schedule credit, 10 years of which have been served in the Hempstead School District, shall receive an

^{1/}The parol evidence rule basically provides that an agreement which is clear in its terms and purports to express the parties' entire agreement on a subject cannot be contradicted, varied, or explained by the parties' prior or contemporaneous communications. Conversely, only contractual language which is vague, ambiguous or otherwise subject to more than one interpretation may be explained by parol evidence. See 58 N.Y. Jur.2d Evidence and Witnesses §§555-618 (1986); Fisch, New York Evidence, §§41-64 (2d ed. 1977). We have endorsed the application of the parol evidence rule in our proceedings in appropriate circumstances. See, e.g., Village of Port Chester, 18 PERB ¶3058 (1985).

annual longevity stipend in the sum of \$750.00. Said longevity stipend is "off schedule" and, therefore, in addition to the scheduled salary paid to the qualifying teacher. Additionally, during the years 1987-88, 1988-89, and 1989-90, the Board agrees to pay \$250.00 to each teacher qualifying for the longevity stipend.

We agree with both the ALJ and the District that the District's obligation to make the \$250 longevity payment was fixed and limited by the plain terms of the parties' last agreement to the three school years referenced. Proof from the Association offered to establish that the parties actually intended something other than what they clearly wrote was properly excluded either on application of the parol evidence rule or as unpersuasive.^{2/} Therefore, we find that the ALJ did not err in denying the Association a hearing pursuant to its offer of proof.^{3/}

Having specifically fixed its obligation to make a \$250 longevity payment to the three-year period referenced, the District

^{2/}In this latter category is evidence that for approximately three months after expiration of the 1984-87 contract, the District continued the \$250 longevity payment despite the presence of language similar to that in the 1987-90 agreement. The District's brief practice under an earlier contract, even if true, cannot change the plain meaning of the terms in the parties' subsequent contract.

^{3/}In addition to the proof offered to the ALJ, the Association for the first time offers to us in its exceptions other provisions in its 1987-90 contract which it alleges show that the District's obligation to make the \$250 longevity payment continued after expiration of that contract. Those facts, not having been offered to the ALJ, cannot be relied upon to support the Association's claim that the ALJ erred by denying it a hearing. Moreover, we do not consider these other provisions to control the plain meaning of the entirely separate longevity clause.

was not required to extend that longevity payment to persons who had not qualified for it during the stated term of the 1987-90 contract. The District similarly did not have to continue the \$250 longevity payment as part of the salary of any unit employee who had been paid that amount for the school years specified in the contract. It is clear from the terms of the expired contract that the \$250 longevity was a necessary component of an individual's salary only for the three school years stated in the collective bargaining agreement. To require the payment of the \$250 thereafter to any unit employee would extend the District's payment obligation beyond the time it agreed those payments would be made, thereby nullifying the "sunset" effect of the language.^{4/}

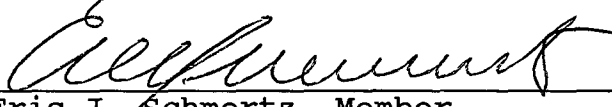
For the reasons set forth above, the Association's exceptions are denied and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

^{4/}A "sunset" provision is one which, pursuant to the parties' agreement, terminates a contract benefit at a specified time or upon specified conditions. Suffolk County, 18 PERB ¶3030 (1985); Yonkers City School Dist., 12 PERB ¶3127 (1979).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, ALBANY COUNTY
LOCAL 801, ALBANY COUNTY DEPARTMENT OF
SOCIAL SERVICES UNIT,

Charging Party,

-and-

CASE NO. U-12160

COUNTY OF ALBANY,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ of counsel),
for Charging Party

WILLIAM CONBOY, COUNTY ATTORNEY (SUSAN M. KUSHNER of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Albany County Local 801, Albany County Department of Social Services Unit (CSEA) to the dismissal by the Director of Public Employment Practices and Representation (Director) of a charge it filed against the County of Albany (County). The charge, as amended, alleges that the County violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when its agents threatened disciplinary action against Marge Flynn, president of CSEA's Local 801, on December 10 and 12, 1990, if she continued to post certain materials on the County's bulletin boards.

The Director dismissed the charge in its entirety after a

hearing. He dismissed the allegations relating to the December 10 postings because there was no evidence of any threat then having been made against Flynn. The Director also dismissed the allegations relating to a second posting Flynn made on December 12. Crediting the County's witnesses' recollection of their conversations with Flynn on December 10 and 12, the Director found that Flynn had agreed with the County not to post any more of the materials the County considered objectionable until CSEA's contractual posting rights were clarified, perhaps by a future grievance. Under that circumstance, the Director concluded that the suggestion made to Flynn by Charles Curtin, the Director of the Legal Division for the County's Department of Social Services, that continued postings could lead to discipline for insubordination did not violate the Act.

CSEA argues in its exceptions that the Director's decision should be reversed because the record shows that Flynn was threatened with discipline for engaging in her statutorily protected right to post written information at the worksite pertaining to an impasse in negotiations between CSEA and the County. The County argues in response that the Director's decision must be affirmed because Flynn was not threatened.

The parties' negotiations for a successor to a contract which expired by its terms on December 31, 1989, began in September 1989. By December 1990, the parties had completed fact-finding and CSEA had undertaken a public relations campaign

intended to cause the County to resume negotiations with proposals more favorable to CSEA. As part of that campaign, CSEA published advertisements in local newspapers, two of which are involved in this case.

~~The material Flynn caused to be posted on December 10 was an~~ enlarged copy of the advertisement that appeared that day in Albany's morning newspaper. That advertisement criticizes County government for having a \$1,000,000 deficit and for using private contractors to run the County's public arena. When Flynn discovered that the advertisement had been removed, she reposted it, this time with a handwritten notation to "all CSEA members" that it was the first in a series of advertisements attempting to "get the County to return to the bargaining table." The December 10 postings were removed on order of the County's agents.

The second advertisement appeared in the local newspaper on December 12. This advertisement complained that the County's failure to extend a pay raise to its employees was "hurting" the local economy, employees' families and the citizens of Albany. Flynn copied both the December 10 and 12 newspaper advertisements onto one sheet of paper bearing the bold-type heading "CSEA Notice" and CSEA's name at the bottom. She then posted this piece of paper, which was also removed by the County.

It is in conversations Flynn had with the Commissioner of Social Services, James P. McCaffrey, on December 10 and with

Curtin on December 12 that Flynn was allegedly threatened with discipline were she to continue to post similar advertisements in the future.

We affirm the Director's dismissal of the charge with respect to the December 10 posting because we do not find any evidence that Flynn was threatened with discipline, even when the witnesses' testimony is viewed most favorably to CSEA.

The Director dismissed the allegations regarding the December 12 posting because he found that Flynn had agreed in a conversation with McCaffrey that, at least temporarily, the postings of the type which the County had removed would not be continued. CSEA contests this finding of fact, but, in affirming the Director's dismissal of the charge, we do not consider it necessary to reach that particular issue of fact. As noted below, our focus is on the parties' collective bargaining agreement. Nor do we consider it necessary to decide whether Flynn was threatened with insubordination if she were to continue posting as she had on December 10 and 12. For purposes of this decision, we will assume that Curtin effectively told Flynn she could be brought up on insubordination charges if she refused to discontinue her posting of newspaper advertisements on the County's bulletin boards.

CSEA's charge rests entirely upon an alleged threat to Flynn's asserted statutory right to post written materials on the County's bulletin boards. The parties' contract, however, gives

CSEA the nonexclusive right to post "notices" on the County's bulletin boards. Without suggesting that Flynn had any rights under the Act to access the County's bulletin boards for the purpose of posting materials of interest to the unit employees, whatever statutory rights she may have had in that respect were replaced by the contractual right to post "notices". Flynn's posting was protected only in the general sense that she had a right to communicate with employees and others regarding the contract negotiations in an effort to rally support for CSEA.^{1/} Whether that general right includes a statutory right to post written materials on the County's property is an issue that we need not decide, the Director's observations in that respect notwithstanding.

Although we have suggested that an employer may violate the Act if it interferes with or discriminates against an employee for the employee's exercise of a contract right,^{2/} we believe that such a violation requires minimally that the employee's contract right be clear and that the employer's interference or discrimination be taken without a colorable claim of corresponding right. For example, an employer arguably violates

^{1/} See generally New York City Transit Auth. (Alston), 20 PERB ¶3065 (1987).

^{2/}New York City Transit Auth., 23 PERB ¶3016 (1990). We did not specify in that case the circumstances under which a violation of contract might constitute an arguable violation of §209-a.1(a) or (c) of the Act because that allegation had not been properly raised.

the Act if it threatens an employee with discipline for filing a grievance if the contractual procedure plainly permits the employee to file the grievance.

As the Director indicated in his decision, the conditions which might favor a statutory violation^{3/} are not present in this case. Whether the postings of the type Flynn made on December 10 and 12 are the type of notices the parties intended under their contract could be posted is an issue untested between the parties. On the record before us, any claim that Flynn's postings were the type of notices which CSEA was permitted by the contract to post on the County's bulletin boards is no more or less valid than the claim advanced by the County that they were not. All we are presented with, therefore, is a difference of opinion between the parties about whether Flynn's postings were permitted by their contract. As did the Director, we cannot conclude in such a circumstance that the County violated the Act when it told Flynn that she could face disciplinary charges if she persisted in conduct which the County believed was not authorized by the contract and which, under the contract, it believed it could prohibit. Such a statement is no more improperly threatening of an employee's statutory rights than if an employer were to tell an employee that the employee's violation of contractual or other work rules might subject the

^{3/}We do not express any opinion about whether Flynn's postings were the type of "notices" permitted by the parties' contract.

employee to disciplinary action, the propriety of which can be tested under the contract. We cannot find the latter to be improper without substantially interfering with the parties' rights and duties under their collective bargaining agreements and we do not discern any better reason to find a violation of the Act on the facts of this case.

For the reasons set forth above, CSEA's exceptions are denied and the Director's dismissal of the charge is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed.

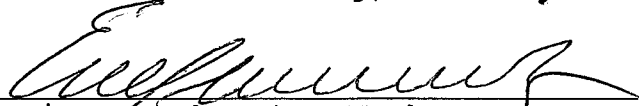
DATED: April 30, 1992
New York, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WATERTOWN EDUCATIONAL CLERICAL ASSOCIATION,

Petitioner,

- and -

CASE NO. C-3895

WATERTOWN CITY SCHOOL DISTRICT,

Employer.

BOARD DECISION AND ORDER

On November 26, 1991, the Watertown Educational Clerical Association (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Watertown City School District (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: All ten and twelve month employees engaged in the performance of clerical, secretarial and stenographic duties.

Excluded: The Internal Auditor, any confidential employees, and all other employees.

Pursuant to that agreement, a secret-ballot election was held, on March 3, 1992, at which three ballots were cast in favor of representation by the petitioner and eight ballots were cast

against representation by the petitioner.^{1/}

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

^{1/} There are 11 eligible employees in the stipulated unit; there was one challenged ballot.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JAMES DEPAOLI, et al.,

Petitioners,

-and-

CASE NO. C-3913

TOWN OF NORTH SALEM,

Employer,

-and-

TOWN OF NORTH SALEM POLICE
BENEVOLENT ASSOCIATION,

Intervenor.

JAMES DEPAOLI, for Petitioner

RAINS & POGREBIN, P.C. (BRUCE R. MILLMAN of counsel), for
Employer

SHELLY B. LOVE CIRAOLO, for Intervenor

BOARD DECISION AND ORDER

On December 14, 1991, James DePaoli, et al., filed a timely petition for decertification of the Town of North Salem Police Benevolent Association (intervenor), the current negotiating representative for employees of the Town of North Salem in the following unit:

Included: Part-time police officers, sergeants and lieutenants.

Excluded: Chief of police and all other employees.

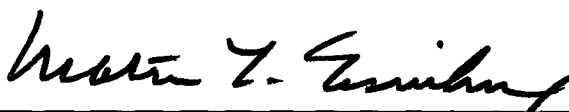
Upon consent of the parties, a mail ballot election was held on March 13, 1992. The results of this election show that the

majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.^{1/}

THEREFORE, IT IS ORDERED that the intervenor be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

^{1/} There were 6 eligible voters. Of the 4 ballots cast, 1 was for representation and 3 against representation. There were no challenged ballots.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MIDDLETOWN NURSES ASSOCIATION, NYSUT, AFT
AFL-CIO,

Petitioner,

-and-

CASE NO. C-3910

ENLARGED CITY SCHOOL DISTRICT OF
MIDDLETOWN,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Middletown Nurses Association, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

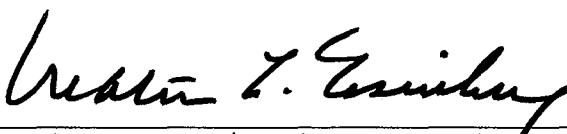
Unit: Included: All registered professional nurses employed by
the District in the title of School Nurse.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Middletown Nurses Association, NYSUT, AFT, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AFSCME, COUNCIL 82,

Petitioner,

-and-

CASE NO. C-3880

VILLAGE OF HERKIMER,

Employer,

-and-

CHARLES W. SOULE POLICE BENEVOLENT
ASSN., INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Charles W. Soule Police Benevolent Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective

negotiations and the settlement of grievances.

Unit: Included: All temporary and full-time patrolmen and officers.

Excluded: Chief of Police and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Charles W. Soule Police Benevolent Association, Inc. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED INDUSTRY WORKERS,
LOCAL 424,

Petitioner,

-and-

CASE NO. C-3892

SECOND SUPERVISORY DISTRICT OF
SUFFOLK COUNTY, BOCES II,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.
AFSCME, AFL-CIO, LOCAL 870

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Industry Workers, Local 424, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive

representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: **Clerical:** Cashier, Clerk, Clerk Typist, Switchboard operator, Stenographer, Clerk Typist Spanish, Senior Clerk, Account Clerk, Account Clerk Typist, Senior Clerk Typist, Computer Graphics Technician, Principal Clerk, Senior Account Clerk, Senior Stenographer, Purchase Technician, Principal Account Clerk, Payroll Supervisor, Principal Stenographer.
Custodial: Custodial Worker I, Laborer, Driver/Messenger, Maintenance Mechanic II, Custodial Worker II, Warehouse Worker II, Head Custodian, Maintenance Mechanic III, Material Control Clerk IV.
Data Processing: Data Entry Operator, Tape Librarian, Data Processing Equipment Operator, Senior Data Entry Operator, Senior Data Processing Equipment Operator, Data Processing Clerk, Computer Technician, Senior Data Processing Clerk.
Instruction: School Administrative Aide, Physical Therapy Assistant, Career Guide Technician, Job Development Coordinator, Registered Nurse, Labor Relations Specialist III, Volunteer Program Coordinator, Occupational Therapist, Physical Therapist.
Other: Bus Transportation Technician, Employee Benefits Coordinator.

Excluded: Secretarial Assistant, Clerk-Typist, and Senior Stenographer in the District Superintendent/Executive Officer's Office and the Stenographers, Account Clerks and Account Clerk Typist in the Personnel Office, Secretary to the Deputy Superintendent, Secretary to the Director of Administrative Services, Secretaries to the Assistant Superintendents, and the Supervisor of Occupational/Physical Therapists. Part-time employees (those who work less than 50% of the time worked by a regular full-time employee in that same job title) are excluded from the bargaining unit.

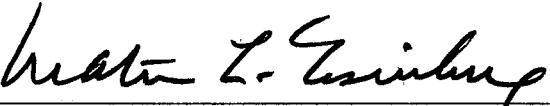
FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Industry Workers,

Local 424. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 30, 1992
New York, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHOOL ALLIANCE OF SUBSTITUTES IN
EDUCATION, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3915

BURNT HILLS-BALLSTON LAKE
CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the School Alliance of Substitutes in Education, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All per diem substitute teachers except those who have received an appointment by the Board to a temporary position.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the School Alliance of Substitutes in Education, NYSUT, AFT, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHOOL ALLIANCE OF SUBSTITUTES IN
EDUCATION, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3878

SHENENDEHOWA CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the School Alliance of Substitutes in Education, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All per diem substitute teachers who have been given reasonable assurance of continued employment.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the School Alliance of Substitutes in Education, NYSUT, AFT, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 30, 1992
New York, New York


Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED INDUSTRY WORKERS, LOCAL 424,

Petitioner,

-and-

CASE NO. C-3886

SEAFORD UNION FREE SCHOOL DISTRICT,

Employer,

-and-

LOCAL 144, DIVISION 100, SEIU, AFL-CIO,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Industry Workers, Local 424, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

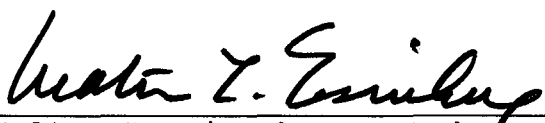
Unit: Included: All custodians, groundskeepers, maintainers, assistant head custodian - evening, elementary head custodian, middle school custodian, senior high head custodian, head maintainer, and cleaners.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Industry Workers. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 30, 1992
New York, New York



Pauline R. Kinsella, Chairperson


Walter L. Eisenberg, Member


Eric J. Schmertz, Member

MEMORANDUM

April 20, 1992

TO: The Board
FROM: John Crotty 
RE: Proposed Rule Changes

We received 11 responses to the Rule changes last proposed. Most support adoption as proposed or take no objection. The following summarizes the objections received by category.

§201.9(g)(1) Certification Without an Election

The Rule change proposes that certification without an election issue on the basis of cards filed within six months before the date of the Director's decision recommending certification without an election instead of the date of the Board's action.

Objectors are concerned that the change will permit certification on stale cards. That possibility can be minimized if not eliminated by the Board giving a priority assignment to any case in which there is an exception filed to the Director's decision recommending certification without an election.

One party suggested that it might be preferable to calculate majority status for certification from a fixed date certain. The date of the Director's decision recommending certification, however, is the only point, other than the date of the Board's action, that can be used without risking certification on unreasonably stale cards.

I recommend adoption of the change to §201.9(g)(1) as originally proposed.

§204.3(b) Motion for Particularization of the Charge

§204.3(d) Motion for Particularization of the Answer

These Rule changes would allow a party to file a response to a motion for particularization of either the charge or the answer within seven working days of receipt of the motion.

One objector questioned the need for the change. The Rule change is necessary to establish or clarify a party's right to file such a response because the current Rules are silent in this respect.

A second objection is that an opportunity for response will delay the proceedings. Delay is unlikely given the specified response time. Moreover, certain of the ALJs were withholding a

decision on a motion for particularization to give the opposing parties an opportunity to file a response. Stating a right to respond and fixing a due date for response may actually speed the adjudication process.

One objector is concerned that seven days is too short a period of time for a response. The purpose for fixing the response at seven days was to conform to other parts of the Rules which fix that type of time frame and to avoid any undue delay in the proceedings. However, our caselaw establishes that it is within the ALJ's discretion to extend the time periods for filing various types of pleadings. An ALJ would be privileged for good cause to extend the seven days for the response to these motions.

I recommend adoption of these Rule changes as proposed.

§204.3(g)

This new Rule would permit a public employer which is made a party by law to a duty of fair representation charge to file a responsive pleading. The objection to this Rule is that it imposes an unfair burden on an employer. A response, however, is not required, merely permitted. The Rule was intended to provide an employer with an opportunity to respond to a charge to the extent the employer considered a response appropriate and to clarify what had been an uncertainty in that respect.

I recommend that this Rule be adopted as proposed.

§207.7(b) Additional Lists

This Rule change provides that a party may request an additional panel list for arbitration if more than three names are unacceptable. The current Rule provides that the additional list can be requested if more than two names are unacceptable. The increase was necessitated by another proposed change in §207.7 which increases the number of panelists on a list from five to seven.

The objection to the change in §207.7(b) is that it may decrease a party's opportunity to reject arbitration lists. That would not appear to be the case, however, because the change is occasioned by the increase in the size of the panel list itself. Moreover, administration of the arbitration process may be benefited to whatever extent this change may arguably decrease a party's opportunity to reject a panel list.

I recommend that §207.7(b) be adopted as proposed.

§210.1(a) Filing of Petition

This Rule change requires that a petition for a declaratory ruling be submitted in writing on a form prescribed by the Director and be signed and sworn to before any person authorized to administer oaths. The change addresses an omission in the current Rules.

One party questioned whether there would be a sufficient availability of forms. Parties have been notified of these Rule changes in different ways and there will be forms available in all offices and available at any party's request.

Another party questioned why the form is required to be sworn when representation petitions are not required to be sworn. A declaratory ruling parallels both a representation proceeding, in which pleadings are not sworn, and an improper practice proceeding in which pleadings are sworn. However, as the declaratory ruling petition can be used to contest the arbitrability of issues in a compulsory interest arbitration proceeding, I recommend the Board adopt the rule change as proposed. The Board may consider at a later date whether to require all pleadings to be sworn.

In summary, I recommend that the Rules be adopted in final form as originally proposed.

cc: Sandra Nathan
Directors

Two definitions are added: "Consummation of the plan" and "Filing". Copies of the escrow agreement and, if applicable, the letter of credit, or bond must be included as exhibits to the plan.

Final rule as compared with last published rule: Substantive changes were made in: 18.3(p)(2); 20.3(o)(3), (5), (6); 21.3(l); 22.3(k); 23.3(q); 24.3(m).

Text of rule, the revised regulatory impact statement, if any, the revised regulatory flexibility analysis, if any, and the assessment of public comment, if any, may be obtained from: Mary Sabatini DiStephan, Department of Law, 23rd Fl., 120 Broadway, New York, NY 10271, (212) 341-2166

Regulatory Impact Statement

There is no change to the substance of the regulatory impact statement as originally published in the *State Register* on September 25, 1991.

Regulatory Flexibility Analysis

There is no change to the substance of the regulatory flexibility analysis as originally published in the *State Register* on September 25, 1991.

Assessment of Public Comment

The Department of Law received four letters containing comments to the proposed amendments to Parts 18, 20, 21, 22, 23 and 24 of Title 13 NYCRR concerning the escrow and trust fund requirements for sales made pursuant to the Martin Act.

Many of the comments requested clarification of some requirements. Some rewording resulted but did not involve substantive change. Other items which were recommended to be eliminated were retained in order to adequately protect the down payments of the investing public in compliance with the statutory mandate.

The original regulation required that all escrow accounts be fully insured. Several comments indicated that this was impractical and would require multiple accounts. Communication with the Federal Deposit Insurance Corporation (FDIC) confirmed that it will insure sub-accounts of a master escrow account so long as the bank is advised of the type of account, the account is clearly titled as an escrow account, and each beneficiary is identified. A problem would arise if an individual down payment were in excess of \$100,000 (which would generally indicate more than a million dollar purchase). The regulation was amended to have sponsors include a special risk that down payments in excess of \$100,000 would not be federally insured beyond \$100,000.

Provision was made for the possibility of accepting instruments for down payments other than checks, drafts or money orders including wire transfers, so long as the instrument identifies the payor.

Although the seven year recordkeeping requirement is one year longer than the contract statute of limitations and the Martin Act requirement for sponsors to maintain documents associated with the offering plan, seven years is required pursuant to Appellate Division rule for attorneys holding escrow funds and, therefore, was retained in the regulations.

The ability of a purchaser to rescind his or her contract if such purchaser does not receive timely notice of the deposit of the escrowed funds was limited to a 90-day period following tender of the down payment and only if the sponsor cannot demonstrate substantial compliance with the regulation. The right is triggered only after fifteen business days following tender of the deposit.

A transition period for implementation of these regulations was included. Sponsors have sixty days from the effective date of the new regulations to transfer funds to escrow accounts in compliance with the regulation.

A bankruptcy filing will not be an automatic ground for release of secured deposits. A determination that rescission is required would be necessary.

Forms were amended to comply with the regulatory changes.

**DEPARTMENT OF
MOTOR VEHICLES**

NOTICE OF ADOPTION

Restricted Licenses

I.D. No. MTV-45-91-00009-A

Filing No. 287

Filing date: Feb. 11, 1992

Effective date: Feb. 26, 1992

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 135.7, 135.9 and 135.12 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 21-4(a), 510-6 and 530(1), (3) and (9)

Subject: Issuance and revocation of restricted licenses and restoration of driver's licenses.

Purpose: To provide for a more detailed review of the driving records of applicants for restricted and full licenses and to require revocation of a restricted license upon conviction of certain traffic infractions.

Text was published in the notice of proposed rule making, I.D. No. MTV-45-91-00009-P, Issue of November 6, 1991.

Final rule as compared with last published rule: No changes.

Text of rule, the revised regulatory impact statement, if any, the revised regulatory flexibility analysis, if any, and the assessment of public comment, if any, may be obtained from: Neal W. Schoen, Assistant Counsel, Legal Bureau, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Albany, NY 12228, (518) 474-0871

Assessment of Public Comment

The agency received no public comment.

**PUBLIC EMPLOYMENT
RELATIONS BOARD**

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Procedures Before the Public Employment Relations Board

I.D. No. PRB-08-92-00016-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of sections 201.9(g)(1); 204.3(b) and (d); 207.7, 207.7(a), (b) and 207.16; 210.1(a); and addition of new subdivision (g) to section 204.3 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 205.5

Subject: Procedures before the Public Employment Relations Board (PERB) and the certification of collective bargaining representatives; the response to a motion for particularization; the process by which parties select arbitrations for voluntary grievance arbitrations and the number of copies of such arbitration award which must be filed with PERB's Director of Conciliation; the form of a petition for declaratory ruling; and the responsive pleading of a public employer to an improper practice charge that an employee organization breached its duty of fair representation with respect to the processing of, or failure to process, a claim that the public employer breached its agreement with such employee organization.

Purpose: To provide for the ascertainment of an employee organization's majority status for purposes of certification without an election as of the date of the decision by the Director of Public Employment Practices and Representation recommending certification without an election; to provide for responses to motions for particularization of improper practice charges and answers; to increase the number of names on a list of panel arbitrators from which parties to can choose an arbitrator for voluntary grievance arbitrations and to provide that parties may strike no more than four names and rank the remaining names from such a panel list and to provide that a party may

request an additional panel list if it determines that more than three names on a panel list are unacceptable and to provide that an arbitrator shall file one copy of the arbitration award with PERB's Director of Conciliation; to provide that a petition for declaratory ruling shall be sworn to and be on a form prescribed by the Director of Public Employment Practices and Representation; to allow a public employer to file a responsive pleading to an improper practice charge alleging that a public employee organization breached its duty of fair representation with respect to processing, or by failing to process, a claim that such public employer breached its agreement with such employee organization and to further provide that failure to file such a responsive pleading may be deemed a waiver of the public employer's right to participate in any hearing held on the improper practice charge.

Text of proposed rule: 1. Paragraph 1 of subdivision (g) of section 201.9 is hereby amended to read as follows:

201.9(g)(1) Certification without an election. If the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization, that choice may be ascertained by the director on the basis of dues deduction authorizations and other evidences instead of by an election. In such a case, the employee organization involved will be certified without an election if a majority of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the [certification.] *date of the director's decision recommending certification without an election.* The determination by the director that the indications of employee support are not sufficient for certification without an election is a ministerial act and will not be reviewed by the board.

2. Subdivision (b) of section 204.3 is hereby amended to read as follows:

204.3(b) Motion for particularization of the charge. If the charge is believed by a respondent to be so vague and indefinite that it cannot reasonably be required to frame an answer, the respondent may, within 10 working days after receipt from the director of a copy of the charge, file an original and four copies of a motion with the administrative law judge for an order directing the charging party to file a verified statement supplying specified information. The filing of such motion will extend the time during which the respondent must file and serve its answer until 10 working days from the ruling of the administrative law judge on the motion, or until such later date as the administrative law judge may set. Such a motion must be served upon the charging party simultaneously with its filing with the administrative law judge; proof of service must accompany the filing of the motion with the administrative law judge. *The charging party may file a response to the motion within seven working days of its receipt thereof, with proof of service of a copy of the response on all other parties.* The failure of a party to timely comply with an order of particularization may, in the discretion of the administrative law judge, constitute ground for precluding the party from offering any evidence as to the matters dealt with by the order.

3. Subdivision (d) of section 204.3 is hereby amended to read as follows:

204.3(d) Motion for particularization of the answer. If the statement of facts supporting any affirmative defense is believed by a charging party to be so vague and indefinite that such charging party cannot reasonably be expected to address them in an expeditious manner at a hearing, such charging party may, within 10 working days after receipt of the answer, file with the administrative law judge an original and four copies of a motion for an order directing the respondent to file a verified statement supplying specified information. Such a motion must be served upon the respondent simultaneously with its filing with the administrative law judge; proof of service must accompany the filing of the motion with the administrative law judge. *The respondent may file a response to the motion within seven working days of its receipt thereof, with proof of service of a copy of the response on all other parties.* The failure of a party to timely comply with an order of particularization may, in the discretion of the administrative law judge, constitute ground for precluding the party from offering any evidence as to the matters dealt with by the order.

4. A new subdivision (g) is hereby added to section 204.3 to read as follows:

204.3(g) A public employer which is made a party to an improper practice charge pursuant to section 209-a.3 of the act may file responsive

pleadings in accordance with section 204.3(a), (b), (c), (d) and (e) of this Part. The administrative law judge may deem the public employer's failure to file any responsive pleading to constitute a waiver of the public employer's right to participate in any hearing held on the allegations of impropriety set forth in the charge.

5. Section 207.7 is hereby amended to read as follows:

207.7 Selection process. After receipt of a demand for arbitration or submission to arbitrate, the director of conciliation shall forward to the representatives named therein two copies of an identical panel list of [five; seven] arbitrators selected from the panel of arbitrators. A resume, including per diem fee, of each arbitrator on such panel list shall be enclosed for the parties' review. Each party shall have 10 days from date of the letter containing the panel list in which to select, rank and return their selections to the director of conciliation.

6. Subdivision (a) of section 207.7 is hereby amended to read as follows:

207.7(a) Selection and preferential ranking. Unless the parties have provided for their own method of selecting an arbitrator in their agreement to arbitrate, the following process for the selection of an arbitrator shall be employed: if more than [three] *four* names on the panel list are acceptable, those names shall be ranked in order of the party's preference and the remaining [name] *names*, if any, shall be stricken. Otherwise the party shall strike no more than [two] *three* names from the panel list and indicate a preference among those names remaining by ranking them (1) [(2) and (3).] *(2), (3) and (4).*

7. Subdivision (b) of section 207.7 is hereby amended to read as follows:

207.7(b) Additional lists. If a party determines that more than [two] *three* names on a panel list are unacceptable, a request by such party for an additional panel list shall be filed with the director of conciliation within the 10-day time period established for selection and preferential ranking. A copy of such request shall be sent to the other party simultaneously. Each party shall have the right to request one additional list, and consequently, no party shall receive more than three panel lists. Pursuant to the selection process, if the parties fail to select an arbitrator after the submission of a third panel list, the director of conciliation shall take whatever steps are necessary to designate an arbitrator.

8. Section 207.16 is hereby amended to read as follows:

207.16 Filing of the award and arbitration report form. Within 10 days of rendering an award, the arbitrator shall file [two copies] *one copy* of the award with the director of conciliation. Upon completion of the assignment, the arbitrator shall submit to the director of conciliation an arbitration report form showing a detailed accounting of fees and expenses (if any) and other relevant information concerning the final disposition of the issue(s) in dispute.

9. Subdivision (a) of section 210.1 is hereby amended to read as follows:

210.1(a) Filing of petition. Any person, employee organization or employer may file with the director an original and four copies of a petition for a declaratory ruling with respect to the applicability of the act to it or any other person, employee organization or employer, or with respect to the scope of negotiations under the act. *The petition shall be in writing on a form prescribed by the director and shall be signed and sworn to before any person authorized to administer oaths.*

Text of proposed rule or revised proposed rule, the regulatory impact statement, if any, and the regulatory flexibility analysis, if any, may be obtained from: Sandra M. Nathan, Public Employment Relations Board, 80 Wolf Rd., Albany, NY 12205-2604, (518) 457-2678
Data, views or arguments may be submitted to: Same as above.

Regulatory Impact Statement

1. Statutory authority:

Civil Service Law, Article 14, section 205.5 empowers the Public Employment Relations Board (PERB or the Board) to adopt, amend and rescind rules relevant to its jurisdiction, the resolution of disputes concerning the representation status of employee organizations, the prevention of improper practices, the resolution of collective bargaining disputes through arbitration and the scope of mandatory bargaining. The proposed amendments concern procedures involving these subjects.

2. Legislative objectives:

The proposed rules better ensure that an employee organization which utilizes individual designation cards as a basis for PERB certification without an election will not unreasonably be denied such certification.

The proposed rules clarify that parties may file papers in response to motions for particularization of improper practice charges and answers.

The proposed rules clarify that a public employer may file a responsive pleading in an improper practice proceeding in which it has been alleged that an employee organization breached its duty of fair representation in processing, or failing to process, a claim against such public employer and, further, clarify the possible consequence to an employer which fails to file any responsive pleading.

The proposed rules enlarge the list of panel arbitrators from which parties may choose an arbitrator to preside at a voluntary grievance arbitration and thereby expedite the selection process. They also provide for the filing of only one copy of the arbitration award with PERB and thereby eliminate the filing of unnecessary paper.

The proposed rules clarify the form to be filed by a party seeking a declaratory ruling.

3. Needs and benefits:

The amendments would clarify existing rules and practices, expedite proceedings before PERB and reduce paperwork.

4. Costs:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None. The proposed rules do not regulate private parties.

(d) Costs to the regulating agency for implementation and continued administration of the rule: (i) The initial cost to PERB for printing forms to be completed by parties seeking declaratory rulings pursuant to proposed amendment to section 210.1(a) will be \$67.00; (ii) the projected annual cost is \$13.40.

5. Paperwork:

(i) A party seeking a declaratory ruling from PERB must file a petition for declaratory ruling on a form prescribed by PERB. A public employer may file with PERB a responsive pleading in an improper practice proceeding in which it is alleged that an employee organization breached its duty in processing, or failing to process, a claim against the said public employer. A party seeking to respond to a motion for particularization of either an improper practice charge or an answer may file such a written response with PERB.

(ii) There are no new reporting requirements that will be added to existing forms or reports. However, a petition for declaratory ruling must be signed and sworn before a person authorized to administer oaths.

(iii) There is no new or additional recordkeeping that will be required of a regulated party to comply with the proposed amendments or to prove compliance with them.

6. Duplication:

The proposed amendments do not duplicate existing state and federal requirements since there are no other state laws or any federal laws regulating the same subject or activity, i.e., collective bargaining in the public sector (excluding the federal government) in the State of New York.

7. Alternatives:

There were no significant alternatives to be considered.

8. Local government mandates:

A public employer/local government may file a responsive pleading to an improper practice charge alleging that a public employee organization breached its duty of fair representation with respect to processing, or failing to process, a claim that such public employer/local government breached its agreement with such employee organization. The public employer/local government's failure to file such a responsive pleading may be deemed a waiver of the public employer/local government's right to participate in any hearing held on the improper practice charge.

A public employer/local government seeking a declaratory ruling must file a petition signed and sworn to before a person authorized to administer oaths on a form prescribed by the Director of Public Employment Practices and Representation.

Regulatory Flexibility Analysis

1. Effect on Small Businesses:

None.

2. Compliance Requirements:

None.

3. Professional Services:

None.

4. Compliance Costs:

None.

5. Minimizing Adverse Impact:

The proposed rules will have no adverse economic impact on small businesses because the proposed rules have no effect on small businesses. The proposed rules apply only to public sector employers, labor organizations and employees.

6. Small Business Participation:

Section 202-b(6) of the State Administrative Procedure Act is not applicable to PERB's rule making.

PUBLIC SERVICE COMMISSION

NOTICE OF ADOPTION

Report Forms by Various Telecommunications Companies

I.D. No. PSC-05-90-00016-A

Filing date: Feb. 7, 1992

Effective date: Feb. 7, 1992

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on Jan. 29, 1992, adopted an order in Case 90-C-0018 approving annual report forms for telephone corporations.

Statutory authority: Public Service Law, section 95

Subject: Report forms—223 telephone corporations, 225 other common carriers and 235 cellular communication companies (Case 12233).

Purpose: To prescribe a new annual report form for cellular communications companies and to amend the annual report forms for other common carriers, AT&T Communications of New York, Inc. and local exchange carriers.

Substance of final rule: The Commission approved Annual Report Form for Cellular Corporations (Form 235) and the new and/or revised schedules to Annual Report Forms 223 and 225, which forms must conform to the terms, conditions and requirements set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Michele Hacker, Assistant to the Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-6506

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(90-C-0018SA1)

NOTICE OF ADOPTION

DSM Bidding Projects by New York State Electric & Gas Corporation

I.D. No. PSC-22-91-00007-A

Filing date: Feb. 7, 1992

Effective date: Feb. 7, 1992

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on Dec. 11, 1991, approved the petition of New York State Electric & Gas Corporation concerning a potential revision to its 1991-1992 demand-side management (DSM) plan (Case 91-E-0480).

Statutory authority: Public Service Law, sections 5(2), 66(1) and (5)

Subject: Demand-side management bidding projects.

Purpose: To combine two demand-side management bidding projects for administrative efficiency, incorporate more accurate financial estimates in the new unified project, and increase certain demand-side management budgetary levels.